Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In the Matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 CRUISERS, INC. 286 Rogue Sport for exoneration from or limitation of liability,

Petitioner,

—v.—

GERALD BERMAN and JOSEPHINA BERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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31 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Can the prior owner of a vessel maintain a proceeding for exoneration from or limitation of liability pursuant to 46 U.S.C. § 183 for acts it performed as the owner of that vessel which subsequently caused an injury to a third-party after its period of ownership had ceased?

PARTIES TO THE PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-appellant:

Marine Recreational Opportunities, Inc. is a privately held corporation. It has no parent or subsidiary corporations that issue shares to the public.

Defendants-appellees:

Gerald Berman and Josefina Berman.

Defendants:

Zachery Berman;

Bennett Marine, Inc. is a privately held corporation with no parents or subsidiaries.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

In the matter of the complaint of Marine Recreational Opportunities Inc. as owner of a 1987 Cruisers Inc. 286 Rogue Sport for exoneration from or limitation of liability,

plaintiff-appellant,

—against—

Zachery Berman and Bennett Marine Inc., defendants

Gerald Berman and Josefina Berman, defendants-appellees

15 F. 3d 270 (2nd Cir. 1994) (1a).

In the matter of complaint of Marine Recreational Opportunities, Inc. as owner of a 1987 Cruisers Inc. 286 Rogue Sport for exoneration from or limitation of liability.

United States District Court, Southern District of New York, 92 Civ. 6476 (JFK), not reported, (7a).

JURISDICTION OF THIS COURT

Jurisdiction of this Court is sought on a *Writ of Certiorari* pursuant to 28 U.S.C. § 1254(1), seeking review of the United States Court of Appeals for the Second Circuit's January 31, 1994 decision affirming the United States District Court for the Southern District of New York's decision dismissing the plaintiff's complaint for lack of subject matter jurisdiction.

ORIGINAL JURISDICTION

Plaintiff, Marine Recreational Opportunities, Inc.'s complaint asserts a claim for exoneration from or limitation of liability under 46 U.S.C. §§ 183-188. Its complaint was filed pursuant to and in accordance with Fed. R. Civ. P. Supp. F. Jurisdiction in the United States District Court for the South-

ern District of New York was based upon the admiralty jurisdiction of the United States as set forth in 28 U.S.C. § 1333.

Jurisdiction in the United States Court of Appeals for the Second Circuit was predicated upon 28 U.S.C. § 1291, as an appeal from the final decision and order of Judge Keenan dated May 11, 1993.

STATUTES INVOLVED IN THE CASE

46 U.S.C. § 183 (set forth at 11a)

Fed. R. Civ. P. Supp. F. (set forth at 13a)

STATEMENT OF THE CASE

In 1991, Marine Recreational Opportunities Inc. ("MRO") purchased a used pleasure craft, a 1987 Cruiser's Inc. 286 Rogue Sport ("P/C Rogue Sport") at a public auction. It was not the manufacturer, wholesaler, resaler, or distributor of the P/C Rogue Sport to the general public. On May 31, 1991 MRO sold the P/C Rogue Sport to Zachery Berman for $41,000.00 and title and possession of the vessel was transferred from MRO to Zachery Berman on that date.

On June 2, 1991 Zachery Berman accompanied by his father Gerald Berman, Josefina Berman and others, took the P/C Rogue Sport out on the Long Island Sound. During the voyage, the boat hit a large wave or wake and Gerald Berman was allegedly thrown around the boat and seriously injured.

Gerald and Josefina Berman filed suit against MRO in New York State Supreme Court, Bronx County to recover damages for Gerald Berman's injuries. In their complaint, the Bermans' alleged *inter alia* that MRO sold Zachery Berman a vessel with defective trim tabs, was negligent in failing to inspect the trim tabs before delivery, was negligent in failing to warn the purchaser of "a known dangerous, defective and

hazardous condition" and was negligent in failing to train him in the proper operation of the vessel.

MRO then brought the instant action under 46 U.S.C. § 183 (1988) pursuant to Fed. R. Civ. P. Supp. F seeking exoneration from, or limitation of its liability for the injuries Gerald Berman allegedly suffered aboard P/C Rogue Sport that MRO had previously owned and sold to Zachery Berman.

Pursuant to the Bermans' motion, the district court dismissed MRO's action for lack of subject matter jurisdiction. MRO appealed this dismissal to the United States Court of Appeals for the Second Circuit. The Court of Appeals on January 31, 1994 affirmed the district court's dismissal, concluding that "MRO was not an 'owner' of the vessel within the meaning of § 183".

LEGAL ARGUMENT

MRO commenced this proceeding to exonerate itself from, or to limit its liability for acts it performed while owner of the P/C Rogue Sport that subsequently caused the accident and injuries allegedly sustained by plaintiffs Berman two days after its ownership of the vessel had terminated pursuant to 46 U.S.C. § 183(a), which provides in pertinent part:

> **The liability of the owner of any vessel, whether American or Foreign, . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.** (11a).

The Second Circuit's conclusion that the use of the term "owner" in § 183 is in the singular and does not suggest other persons in this chain of title (such as prior owners) is contrary

to the express language of the statute which clearly states "owners".

Section 183 was enacted to encourage investment in ships and shipping. *American Car & Foundery Co. v. Brassert*, 289 U.S. 261, 263, 53 S.Ct. 618, 619 77 L.Ed 1162 (1933).

To foster the purposes of the Limitation of Shipowners Liability Act, 46 U.S.C. §§ 181 to 188,

> **Courts have always construed the term "owner" in § 183 very broadly, in order to effectuate the Congressional intent. *Flink v. Paladini*, 279 U.S. 59, 489 S.Ct. 255, 73 L.Ed 614 (1929), *Standard Oil Co. of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 45 S.Ct 465, 69 L.Ed 890 (1925); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 645 (9th Cir. 1961); *Austerberry v. United States*, 169 F.2d 583, 593 (6th Cir. 1948); *In re Trojan*, 167 F.Supp. 576 (N.D. Cal. 1958); *In re Petition of Colonial Trust Co.*, 124 F. Supp. 73 (D.Conn. 1954); *The Milwaukee*, 48 F.2d 842 (E.D. Wis. 1931). These cases have held such diverse parties and shareholders, mortgageses, prior vendors, life tenants, trustees and government agencies operating privately owned ships in wartime to be "owners" entitled to limit liability.**

In re Barracuda Tanker Corporation, 281 F. Supp. 228, 232 (S.D.N.Y.1968), *remanded on other grounds*, 409 F.2d 1013 (2d Cir. 1969).

As a general rule, one who is subjected to a shipowner's liability because of his exercise of dominion and control over a vessel should be able to limit his liability to that of an owner. *Dick v. The United States*, 671 F.2d 724, 727 (2d Cir. 1982); see also, *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 644-46 (9th Cir. 1961); *In re Petition of the United States*, 259 F.2d 608, 610 (3d Cir. 1958).

In determining whether a party is entitled to the benefits of the Limitation of Shipowners Liability Act, courts are cognizant that "the right to limitation, up until the present time remains broadly construed and extends to any person whose interest will make him a likely target of litigation". *In re Shell Oil Co.*, 780 F. Supp. 1086, 1092 (E.D. La. 1991).

MRO, while owner of the P/C Rogue Sport performed all of the necessary repairs and maintenance to the vessel. On May 31, 1991 it sold this vessel to Zachery Berman for $41,000.00. It is MRO's conduct in maintaining the vessel prior to the sale, and its conduct during the sales transaction that have made it the target of the Bermans' litigation. It is for these acts that MRO seeks the protection of the Limitation of Shipowners Liability Act, 46 U.S.C. § 183.

As the Second Circuit noted, "in most of the cases that purport to apply a broad interpretation of 'owner', the party seeking to limit liability had actual title or was capable of exercising some measure of control over the vessel at the time of the accident". *Marine Recreational Opportunities, Inc. v. Berman*, 15 F.3d 270 (2d Cir. 1994) (1a). In those reported cases, like most negligence actions against vessel owners, the conduct for which the owners sought limitation was performed during their period ownership, usually immediately prior to the accident; the accident occured while they owned the vessel; and they commenced their limitation proceeding prior to transfering ownership of the vessel.

From the research we have done, our adversary did, and both the District Court and the Second Circuit performed, it appears that in only one other case has a court reached and decided the issue: "may a person who at the time of the accident had neither legal, nor equitable title qualify as an owner if the accident; was proximately caused by such persons conduct at the time when he unquestionably was the owner and unquestionably had the right of limitation". *In re The Trojan*, 167 F. Supp. 576, 578 (N.D. Cal. 1958), *Aff'd sub nom, Todd*

Shipyards Corp. v. United States, 274 F.2d 402 (9th Cir. 1960).

In *The Trojan*, the United States sold the vessel to Sheffield Tankers Corporation on December 26, 1956. On January 29, 1957 while the Trojan was at Todd Shipyards, the vessel exploded causing extensive damage and injuring or killing 52 persons. Todd Shipyards commenced suit against the United States alleging that it made misrepresentations as to the nature of the fuel on board the vessel during the course of the sale to Sheffield and that this misrepresentation was the cause of the explosion. 167 F. Supp. at 577, 578. The United States then filed its petition to limit its liability pursuant to 46 U.S.C. §§ 183-188. Todd Shipyards moved to dismiss the petition of the United States. The district court found the United States as prior owner had standing to maintain its limitation of liability action. The Ninth Circuit affirmed the district court's decision, finding there were claims asserted that were clearly subject to limitation. 274 F. 2d at 402.

The Second Circuit's holding in this matter, that since MRO was not the owner of the vessel at the time of the accident and therefore cannot maintain a limitation of liability proceeding is in direct conflict with the Ninth Circuit's decision in *Todd Shipyards Corp. v. United States*, supra.

As the court in *The Trojan, supra*, correctly noted,

> **thus it is this court's opinion that in order to effectuate the purposes of the act, the motion to dismiss herein should be denied. To hold otherwise would subject a person to greater liability after a sale than existed before a sale. The weakness of such a holding appears when it is recalled that the alleged liability arose as a result of negligent conduct occurring before the sale and during ownership, at which time, limitation would clearly be have been available.**
> *id.* at 578.

In this case, just like it would have been in *The Trojan, supra*, if MRO is denied the protection of the Limitation of Shipowners Liability Act, it will be unjustly subjected to greater liability for acts it did while owner of the P/C Rogue Sport merely because its ownership interest in the vessel had ceased prior to the accident.

The rule which had emerged from all cases interpreting ownership pursuant to 46 U.S.C. § 183 has been that, if the plaintiff in limitation may be held liable because of his ownership or control of the vessel then he can maintain a limitation action. *In re Shell Oil Co., supra* at 1090; *In re Barracuda Tanker Corporation, supra* at 232

The rule now advanced by the court below creates a direct conflict between the Ninth Circuit and the Second Circuit over a material provision of the Limitation Act.

CONCLUSION

We respectfully submit that the Ninth Circuit's decision in *Todd Shipyards Corp. v. United States*, *supra*, permitting a prior owner to maintain a limitation of liability proceeding is both legally and logically correct, and that the decision of the Second Circuit in this matter to the contrary was in error, and must be reversed. Since MRO was the owner of the vessel at the time it performed the acts which the Bermans' assert were negligent, MRO as owner should be permitted to maintain its action to exonerate itself, or limit its liability for that conduct. MRO's petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 514—August Term, 1993

(Argued: October 28, 1993 Decided: January 31, 1994)

Docket No. 93-7561

In the matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 Cruisers, Inc. 286 Rogue Sport for exoneration from or limitation of liability,

Plaintiff-Appellant,

—v.—

ZACHARY BERMAN and BENNETT MARINE, INC.,

Defendants,

GERALD BERMAN and JOSEPHINA BERMAN,

Defendants-Appellees.

Before:

LUMBARD, VAN GRAAFEILAND and WINTER,
Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York (John F. Keenan, *Judge*) dismissing a limitation or exoneration action for lack of subject matter jurisdiction on the grounds that plaintiff was not the owner of the vessel at the time of the accident.

Affirmed.

JOSEPH J. PERRONE, New York, New York (Peter D. Fenzel, New York, New York, of counsel), *for Plaintiff-Appellant.*

RICHARD D. TUNICK, New York, New York, *for Defendants-Appellees.*

WINTER, *Circuit Judge*:

Marine Recreational Opportunities, Inc. ("MRO") appeals from Judge Keenan's order dismissing its complaint for lack of subject matter jurisdiction. MRO commenced this action under 46 U.S.C. § 183 (1988), seeking exoneration from, or limitation of, its liability for injuries to Gerald Berman. Berman's injuries were suffered aboard a vessel previously sold by MRO. We conclude that MRO was not an "owner" of the vessel within the meaning of Section 183. We therefore affirm the district court's dismissal.

In 1991, MRO purchased a pleasure craft, a 1987 Cruisers, Inc. 286 Rogue Sport ("p/c Rogue Sport") at a public auction. On May 31, 1991, MRO sold the vessel to Zachary Berman, Gerald Berman's son, for $41,000, and

title and possession of the vessel transferred from MRO to Zachary Berman on that date. On June 2, 1991, Zachary Berman, accompanied by Gerald and Josephina Berman, took the p/c Rogue Sport out on Long Island Sound. When the boat hit a large wave or wake, Gerald Berman was allegedly thrown around the boat and seriously injured.

Gerald and Josephina Berman filed suit against MRO in New York State Supreme Court, Bronx County, to recover damages for Gerald's injuries. In their complaint, the Bermans alleged, *inter alia*, that MRO sold Zachary Berman a vessel with defective trim tabs, was negligent in failing to inspect the trim tabs before delivery, was negligent in failing to warn the purchaser of "a known dangerous, defective and hazardous condition," and was negligent in failing to train him in the proper operation of the vessel.

MRO then brought the instant action pursuant to Fed. R. Civ. P. Supp. F. seeking exoneration from, or limitation of, its liability for the alleged injuries. Pursuant to the Bermans' motion, the district court dismissed the action for lack of subject matter jurisdiction. This appeal followed.

Section 183(a) provides in pertinent part:

> The liability of the owner of any vessel, whether American or foreign, . . . for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

We conclude that this statute does not apply to MRO because it was not the owner of the p/c Rogue Sport at the time of the accident, and it is not being sued in that capacity.

Section 183 was enacted in 1851 "to encourage investments in ships and their employment in commerce," so that "the shipping interests of this country might not suffer in competition with foreign vessels." *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 263 (1933). To effectuate this purpose, the term "owner" as used in the statute has been interpreted in a "liberal way." *Dick v. United States*, 671 F.2d 724, 727 (2d Cir. 1982) (*quoting Flink v. Paladini*, 279 U.S. 59, 63 (1929)). In *Dick v. United States*, we stated that "[a]s a general rule, one who is subjected to a shipowner's liability because of his exercise of dominion over a vessel should be able to limit his liability to that of an owner." 671 F.2d at 727. MRO argues that under this liberal interpretation of the term "owner," it is entitled to limit its liability, because the Bermans seek to hold it liable for alleged negligence that occurred when the vessel was under its dominion and control.

However, in most of the cases that purport to apply a broad interpretation of "owner," the party seeking to limit liability had actual title or was capable of exercising some measure of dominion or control over the vessel at the time of the accident. *See id.* at 726-28; *In re Exoneration from or Limitation of Liability of Shell Oil Co.*, 780 F. Supp. 1086, 1087, 1089-90 (E.D. La. 1991) (parent corporation that conveyed vessel to subsidiary but retained record title is "owner" because "the act is designed to cover one who is a 'likely target' for liability claims predicated on his status as the person perhaps ultimately responsible for the vessel's maintenance and operation"); *In re Barracuda*

Tanker Corp., 281 F. Supp. 228, 231 (S.D.N.Y. 1968) (plaintiff considered "owner" where it sold and leased back vessel prior to accident), *remanded on other grounds*, 409 F.2d 1013 (2d Cir. 1969).

MRO cites only one case that allowed limitation of liability by a prior owner who lacked any measure of control over the vessel at the time of the accident giving rise to liability. *In re The Trojan*, 167 F. Supp. 576, 578 (N.D. Cal. 1958), *aff'd sub nom Todd Shipyards Corp. v. United States*, 274 F.2d 402 (9th Cir. 1960). We decline to follow *The Trojan*. Other courts have uniformly held that the time of the accident determines "ownership" under Section 183. Indeed, after *The Trojan*, the Ninth Circuit itself held that a plaintiff who acted as an agent in the sale of a fishing boat was not an owner within the meaning of the statute. *See Calkins v. Graham*, 667 F.2d 1292 (9th Cir. 1982). In reaching its conclusion, the court stated, "When the accident occurred, Calkins no longer had possession or control of the vessel, nor was he responsible for its maintenance and operation. . . ." *Id.* at 1294; *see also Complaint of Sheen*, 709 F. Supp. 1123, 1128 (S.D. Fla. 1989) (". . . [T]he appropriate time of ownership for [Section 183] purposes must be the period encompassing the maritime accident"). One does not have to become a plain-meaning-of-the-statutory-language fanatic to conclude that a complete absence of legal title and of any practical control over a vessel at the time of the relevant accident precludes resort to Section 183. The use of the term "owner" in Section 183 is in the singular and does not suggest other persons in this chain of title. Extension of Section 183 to others in the chain of title is a rather extraordinary step, and any intent to afford prior owners the benefits of limitation or exoneration certainly would have found expression in the statutory language. More-

over, a contrary ruling would create a conflict among the circuits without our having any compelling reason to depart from the precedents of other circuits. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *aff'd in part*, 112 S. Ct. 2701 (1992); *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628, 631-32 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990).

The district court therefore properly dismissed the complaint for lack of subject matter jurisdiction. We affirm.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

92 CIV. 6476 (JFK)

In The Matter of the Complaint of Marine Recreational Opportunities, Inc., as owner of a 1987 Cruisers, Inc. 286 Rogue Sport for exoneration from or limitation of liability.

OPINION AND ORDER

APPEARANCES: For Plaintiff Marine Recreational:
McDonald, Herbermann & Fenzel
New York, New York
Of Counsel:
Joseph J. Perrone, Esq.
Joseph B. McDonald, Esq.

For Claimants Gerald and Josefina Berman:
Richard D. Tunick, Esq.
New York, New York

JOHN F. KEENAN, United States District Judge:

Before the Court is a motion by Claimants Gerald Berman and Josefina Berman ("Claimants") to dismiss Plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim. Fed. R. Civ. P. 12(b)(1), (6). For the reasons that follow, their motion is granted.

BACKGROUND

On May 31, 1991, Plaintiff Marine Recreational Opportunities, Inc. ("MRO") sold a pleasure craft, a 1987 Cruisers, Inc. 286 Rogue Sport, to a man named Zachery Berman for $41,000.00. MRO had purchased the vessel on the open market sometime in 1991, and was not the manufacturer, wholesaler, resaler or distributor of the vessel to the general public.

On June 2, 1991, Mr. Berman took his new boat out on Long Island Sound, accompanied by two guests: Gerald and Josefina Berman, the Claimants. When the boat hit a large wave or wake, Claimant Gerald Berman was allegedly thrown around in the interior of the boat and injured.

On February 21, 1992, approximately eight months after the accident, MRO repurchased the vessel from Zachery Berman.

Mr. Gerald Berman and his wife have filed a tort action in Bronx County State Supreme Court against both MRO and Zachery Berman to recover for Mr. Gerald Berman's injuries and Mrs. Berman's derivative losses. MRO thereafter filed this action under Supplemental Rule F of the Federal Rules of Civil Procedure seeking exoneration from or limitation of its liability for its conduct during its sale of the vessel to Mr. Berman.

DISCUSSION

46 U.S.C. section 183(a) provides that

> [t]he liability of the owner of any vessel, whether American or foreign, for any . . . loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

This statute was enacted in 1851 "to encourage investments in ships and their employment in commerce." *American Car and Foundry Co. v. Brassert*, 289 U.S. 261 (1933). As the Supreme Court has explained, "[t]he statute embodied the principle of the general maritime law that shipowners should not 'be liable beyond their interest in the ship and freight for the acts of the master and the crew done without their privity or knowledge.'" *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527, 549 (1889). The statute therefore limits "a liability imputed by law by reason of the ownership of the vessel," but does not limit any liability arising from the owner's own fault, neglect or contracts. *See Richardson v. Harmon*, 222 U.S. 96, 103, 106 (1911).

The first inquiry in determining whether the statute is applicable is whether the plaintiff was the owner of the vessel within the meaning of the statute. There is no dispute that MRO was the owner of the vessel until May 31, 1991, two days before the accident, and from the time of February 21, 1992, eight months after the accident. Plaintiff concedes that it did not own the vessel on the date of the accident, and that is the relevant date under the statute. *See Calkins v. Graham*, 667 F.2d 1292 (9th Cir. 1982) ("The circumstances which make one a 'likely target' [for legal claims resulting from a vessel accident] must exist at the time of the accident or loss."); *American Car & Foundry Co. v. Brassert*, 61 F.2d 162, 164 (7th Cir. 1932) (issue is whether the party seeking to limit liability was owner at time of accident), *aff'd*, 289 U.S. 261 (1933); *In Re Complaint of Sheen*, 709 F. Supp. 1123, 1128 & n.4 (S.D. Fla. 1989) ("appropriate time of ownership for Limitation Act purposes must be the period encompassing the maritime accident").

MRO can point to only a single case, *In Re Trojan*, 1959 A.M.C. 201 (N.D. Cal. 1958), for the proposition that a former owner can petition for limitation of liability based on the fact that his own negligent conduct occurred before the sale of the vessel. That case was never appealed to the Ninth Circuit; in fact, since that lower-court decision, the Ninth

Circuit has clearly held that the relevant period of ownership for limitation Act purposes is the time of the accident. *See Calkins v. Graham*, 667 F.2d 1292 (9th Cir. 1982). The Court declines, therefore, to follow down the lonely path of *In Re Trojan*.

Because MRO was not the owner of the vessel at the time of the accident, its relationship to the vessel cannot be the basis of potential liability. If there is any liability on MRO's part, it flows not from MRO's relationship to the vessel but from any negligent acts or omissions in selling the vessel to Mr. Berman in less-than-perfect condition or without giving appropriate warnings. That is not the sort of liability towards which the statute is directed.

Accordingly, the Court finds that it lacks subject-matter jurisdiction over this action. Claimants' motion to dismiss for failure to state a claim need not be considered.

This action is ordered removed from the Court's active docket.

SO ORDERED.

Dated: New York, New York
May 11, 1993

JOHN F. KEENAN
John F. Keenan
United States District Judge

46 U.S.C. § 183

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is sufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

Federal Rule Civil Procedure Supp. F.

Rule F.Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or

proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited

arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the

court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

No. 93-1738

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

In the Matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 CRUISERS, INC. 286 Rogue Sport for exoneration from or limitation of liability,

Petitioner,

against

GERALD BERMAN and JOSEPHINA BERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 93-1738

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

In the Matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 CRUISERS, INC. 286 Rogue Sport for exoneration from or limitation of liability,

Petitioner,

-v.-

GERALD BERMAN and JOSEFINA BERMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

In its petition for certiorari, petitioner has presented an incomplete analysis of the holding of the Court of Appeals. For the following reasons, certiorari should be denied:

1. the Court of Appeals based its

decision on two adequate grounds, only one of which has been presented for review by the petitioner;

2. the Court of Appeals' decision is not in conflict with any other circuit and is, in fact, in accord with a decision of the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

The Court is respectfully referred to the decision of the Court of Appeals, reproduced at pages 1a through 6a of the petition, for an accurate statement of the backgound facts giving rise to that Court's holding.

The petitioner has based its application for a writ of certiorari on the sole ground that the court below erred in holding that a prior owner of a vessel, who at the time of the maritime accident exercised no dominion, possession, management or control over the vessel, did not have the right to petition for

exoneration or limitation of liability pursuant to 46 U.S.C. 183, et seq. While that was undoubtedly the primary ground upon which the Court of Appeals affirmed the dismissal of the petition, the petitioner failed to mention that the Court further held that the petition had to be dismissed because petitioner was not being sued in the capacity of owner of the vessel. (See, at p. 4a top). This second basis for dismissal of the original petition in limitation is critical to this Court's consideration of the within petition for certiorari.

WHY THE PETITION SHOULD BE DENIED

I. The Court below based its opinion on two independent and adequate grounds, only one of which has been presented to the Court in the within petition.

The Court below found that petitioner was not entitled to the benefits of the limitation statute "because it was not the owner of the p/c Rogue Sport at the time of the accident, and it is not being sued in that capacity" (emphasis

supplied). The fact that petitioner was not being sued as an owner of the vessel, while not extensively discussed in the lower court opinion, goes to the heart of the application of the Limitation Act to this particular controversy.

The Limitation Act specifically excludes from coverage acts of negligence which are within the "privity or knowledge" of the owner of the vessel. The Supreme Court, in its affirmance of American Car & Foundry Co. v. Brassert, 289 U.S. 261, made this simple and oft cited observation:

> "The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect and contracts the owner remains liable."

The Court of Appeals, in its opinion, reproduced at page 3a of the Petition recognizes that the Bermans, in their state court action, charge petitioner with active negligence in

failing to deliver the vessel with functioning trim tabs, with failing to inspect the trim tabs before delivery, with failing to warn the purchaser of a known dangerous condition and with failing to train the boat's purchaser in the operation of the vessel. None of these allegations charge the petitioner with imputed liability. If such active negligence be established, petitioner is not entitled to limitation. Many cases have held that an owner who delivers a vessel in unseaworthy condition due to defective equipment at the start of a voyage is not entitled to limitation because he is chargeable with knowledge of the existence of that condition. See Villers Seafood Co. v. Vest, 813 F.2d 339 (CA 11th, 1987); Re Reichert Towing Line, 251 F. 214 (2d Cir., 1918), cert den 248 U.S. 565 (1918); The Yungay, 58 F.2d 352 (S.D.N.Y., 1931); The Mattie, 38 F. Supp. 745 (E.D.N.Y., 1941), aff'd 136 F.2d 904 (2d Cir., 1943).

The recently decided case of Joyce v.

Joyce, 975 F.2d 379 (7th Cir., 1992) addresses this specific issue in a case remarkably similar to the case at bar. In that case, a passenger on a newly purchased pleasure boat suffered a severely fractured back when she was tossed about the boat after it struck the wake of another boat. The owner of the boat, who was not present, had permitted a third person to operate the vessel. The passenger had commenced a state court negligence action against the owner on a theory of negligent entrustment to a person not qualified to operate the vessel. Four days after the owner of the vessel filed a Limitation Act petition in the district court, and before any appearance or responsive pleading had been filed, the court, sua sponte, dismissed the petition for lack of subject matter jurisdiction.

In its decision, the Seventh Circuit first reviewed the history of the Limitation Act, making specific reference to the American Car & Foundry holding that "[F]or his own fault,

neglect and contracts the owner remains liable." The Court found that the judicial trend has been to enlarge the scope of activities within the privity and knowledge of the owner, "including...requiring shipowners to exercise an ever increasing degree of supervision and inspection".

The theories of liability alleged by the Bermans against petitioner in their state court action charge active negligence, much like the theory of negligent entrustment alleged in Joyce. Petitioner has been charged with failing to properly inspect the vessel prior to delivery to the new owner, in failing to properly maintain and service the trim tabs prior to such delivery, in placing the vessel in the hands of an inexperienced operator without training him or ascertaining whether he had the requisite skill to operate the vessel and in failing to warn the new owner of the danger of operating the vessel without functioning trim tabs. Each of these allegations entails a charge of active

negligence and fault on the part of petitioner.

The Seventh Circuit in Joyce, and both Judge Keenan in the district court and the Second Circuit in affirming, found that this is not the type of liability towards which the statute was directed. In Joyce, the Court succinctly stated: "if a shipowner knows enough to be liable for negligent entrustment, he knows too much to be eligible for limited liability under the Act". In dismissing the proceeding, the Court in Joyce held at 379 F.2d 385:

> "Given the nature of the tort of negligent entrustment, it is clear that the Limitation of Shipowner's Liability Act affords no protection to William. If William knew or had reason to know that Ivkovich should not have been entrusted with the boat, he not only committed the tort of negligent entrustment but also had either knowledge or constructive knowledge sufficient to place him beyond the protection of the Limitiation of Liability Act. On the other hand, if William did not entrust the boat to

> Ivkovich under the circumstances in which he knew or should have known of Ivkovich's inability, he will incur no liability for negligent entrustment, and, consequently, has no need of the Act's protection. In either case, the district court could not do anything to affect either party and was correct to dismiss the suit for lack of subject matter jurisdiction."

In the case at bar, the critical factor is that the allegations of negligence against petitioner derive from its own actions, not from the acts of Zachary Berman, who was neither an employee, servant nor agent of petitioner whose acts could be imputed to petitioner. Petitioner's liability will be determined by an assessment of its own conduct. If it is found to have committed the acts charged, it will be held responsible for its own fault. If the jury should exonerate petitioner from having committed the claimed negligence, it will have no need of the Limitation Act's protection.

II. The Court of Appeals decision is not in conflict with the decision of any other circuit.

Petitioner's contention that a conflict exists between the Circuits on the issue of whether a prior owner of a vessel, who had no ownership interest at the time of the maritime accident, may seek the protection of the Limitation Act is misleading and inaccurate. Petitioner's statement that the only case to address the issue is In re The Trojan, 167 F. Supp. 576, 578 (N.D. Cal. 1958), Aff'd sub nom, Todd Shipyards Corp. v. United States, 274 F.2d 402 (9th Cir. 1960) is simply untrue.

Many cases have addressed the issue of time of ownership for Limitation Act purposes and have unequivocally held that the appropriate period is the time of the maritime accident. American Car & Foundry Co. v. Brassert, 61 F.2d 162 (7th Cir., 1932), affd. 289 U.S. 261, 53 S. Ct. 618, 77 L. Ed. 1162; Calkins v. Graham, 667 F.2d 1292 (9th Cir., 1982); Complaint of Sheen, 709 F. Supp. 1123 (S.D.Fla., 1989). This weight

of authority caused Judge Keenan in the District Court to refuse to follow the "lonely path" of In Re Trojan and the Second Circuit to reach a similar conclusion.

The Ninth Circuit's affirmance of In Re Trojan was in a per curiam opinion which never discussed the issue of the right of a prior owner to seek the protection of the statute. Rather, the Ninth Circuit focused more on the fact that there were other claims being asserted in the proceeding which were "clearly subject to limitation." Of greater significance, is the fact that the petitioner has declined to mention that the Ninth Circuit, in a later decision, extensively discussed the issue of time of ownership for limitation purposes and came to the same conclusion reached in all other cases that the time of the maritime accident controls. Calkins v. Graham, 667 F.2d 1292 (9th Cir., 1982). Any doubt concerning the Ninth Circuit's position on the issue is dispelled by the following holding in Calkins:

"When the accident occurred, Calkins no longer had possession or control of the vessel, nor was he responsible for its maintenance and operation; Ballo was in possession and control and responsible for the vessel's maintenance and operation under her sales agreement with AOF. The circumstances which make one a "likely target," as in Admiral Towing, supra, 290 F.2d 641, must exist at the time of the accident or loss. See American Car & Foundry Co. v. Brassert, 61 F.2d 162, 164 (7th Cir.), aff'd 289 U.S. 261, 53 S. Ct. 618, 77 L. Ed. 1162 (1933), (the issue is 'whether [the party seeking to limit liability] was the owner of the boat at the time of the accident.').

* * * * * *

In our case Ballo was not in default on her sales agreement with AOF at the time of the accident and Calkins had no personal ownership or security interest in the Lucky One.

* * * * * *

Since Calkins has failed to show that he was an "owner" or "charterer" of the Lucky One at the time of the accident under any legal test, he is not entitled to limitation under 46 U.S.C. 183 or 186."

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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